

**United States Department of Labor
Employees' Compensation Appeals Board**

S.T., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Decatur, GA, Employer**

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**Docket No. 09-1134
Issued: December 16, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 24, 2009 appellant filed a timely appeal of decisions dated February 5 and 26, 2009 of the Office of Workers' Compensation Programs denying her claim of injury and denying her reconsideration request without further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an occupational disease in the performance of duty; and (2) whether the Office properly denied her request for reconsideration without further merit review.

FACTUAL HISTORY

On June 30, 2008 appellant, then a 59-year-old pharmacy technician, filed an occupational disease claim alleging that she sustained left shoulder pain from tearing paper off of

a computer. She first realized that her condition was caused or aggravated by employment activities on June 21, 2008. Appellant did not stop work.

On July 7, 2008 the Office advised appellant of the factual and medical evidence necessary to establish her claim and allowed her 30 days to submit such evidence. In particular, it requested a description of the job activities that she believed contributed to her claimed condition as well as a description of all activities outside of her employment. The Office also requested a medical report with a physician's diagnosis and opinion on causal relationship.

In a July 18, 2008 statement, appellant advised that collating and ripping paper off of a printer caused her left shoulder injury. She performed this duty continuously, at least two to three hours daily. Appellant also noted that she did not engage in strenuous activities outside of her employment.

In a September 29, 2008 decision, the Office denied appellant's claim. It found the evidence insufficient to establish that the events occurred as alleged and that there was no medical evidence with a diagnosis that could be connected to the claimed work activity.

On October 3, 2008 appellant requested reconsideration. In support of her claim, she submitted a September 24, 2008 report from Dr. Maurice Jove, a Board-certified orthopedic surgeon, who noted that appellant had a four-year history of left shoulder pain and discomfort. Dr. Jove also noted normal x-ray findings. He recommended a cortisone injection and a magnetic resonance imaging (MRI) scan. In a treatment note of the same date, Dr. Jove indicated that appellant was seen that day for a workers' compensation injury. In a September 25, 2008 statement, appellant indicated that she was treated by Dr. Jove on September 24, 2008 as her previous treating physician had retired.

In a November 3, 2008 decision, the Office denied modification of its September 29, 2008 decision.

Appellant submitted a reconsideration request dated November 3, 2008. She also submitted a November 11, 2008 statement indicating that the present claim was a continuation of her left shoulder pain from a previous claim for a June 23, 2004 injury.¹

Occupational therapy notes dated between July 2, 2004 to November 5, 2008 diagnosed left trapezius and shoulder pain from collating papers at work. Appellant also provided July 17 and 24, 2008 employing establishment health unit records signed by a nurse practitioner. She also submitted another copy of Dr. Jove's September 24, 2008 treatment note.

In a February 5, 2009 decision, the Office modified its November 3, 2008 decision. It found that, although appellant identified two work factors, the medical evidence did not establish that her left shoulder condition was causally related to the identified work factors.

¹ On July 7, 2004 appellant filed a traumatic injury claim for a left shoulder injury sustained on June 23, 2004 from collating paper from a machine. That claim was assigned File No. xxxxxx164. The Office accepted that claim for left shoulder strain. However, that claim is not presently before the Board.

Appellant requested reconsideration on February 18, 2009. In support of her request, she submitted occupational therapy notes already of record.

In a February 26, 2009 decision, the Office denied appellant's reconsideration request finding that she did not submit any new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.²

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.³

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁴

ANALYSIS -- ISSUE 1

The record supports that appellant's position as a pharmacy technician requires ripping and collating paper from a printer. However, appellant submitted insufficient medical evidence to establish a diagnosed left shoulder condition causally related to her employment activities.

Dr. Jove's September 24, 2008 report noted that appellant had left shoulder pain for four years. He indicated that x-rays revealed normal findings. Dr. Jove also recommended a

² *J.E.*, 59 ECAB ____ (Docket No. 07-814, issued October 2, 2007); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *D.I.*, 59 ECAB ____ (Docket No. 07-1534, issued November 6, 2007); *Roy L. Humphrey*, 57 ECAB 238 (2005).

⁴ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

cortisone injection and MRI scan. However, he did not provide a firm medical diagnosis for appellant's left shoulder condition, as he only diagnosed pain.⁵ Dr. Jove did not address whether her condition was caused or aggravated by her job duties. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁶ Dr. Jove generally noted in a September 24, 2008 treatment note that appellant was seen that day for a workers' compensation injury. However, he did not provide a reasoned opinion on causal relationship or discuss how continuous tearing and collating paper contributed to her left shoulder condition. As noted, part of appellant's burden of proof includes submitting a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.

The record also contains progress notes from several occupational therapists that diagnosed left trapezius and shoulder pain from collating papers. However, occupational therapists are not competent to give a medical opinion as they are not considered physicians under the Act.⁷ Likewise, employing establishment health unit records signed by a nurse cannot be considered as medical evidence.⁸

For these reasons, appellant did not submit sufficient medical evidence to establish that she has a left shoulder condition that was caused or aggravated by her employment activities.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁹ Section 10.608(b) of Office regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰

⁵ See *C.F.*, 60 ECAB ____ (Docket No. 08-1102, issued October 10, 2008) (pain is a symptom, not a compensable medical diagnosis).

⁶ *S.E.*, 60 ECAB ____ (Docket No. 08-2214, issued May 6, 2009).

⁷ See 5 U.S.C. § 8101(2); *Jerre R. Rinehart*, 45 ECAB 518 (1994) (where the Board has held that an occupational therapist is not a physician within the meaning of the Act).

⁸ *G.G.*, 58 ECAB ____ (Docket No. 06-1564, issued February 27, 2007) (nurses are not physicians under the FECA and are not competent to render a medical opinion).

⁹ *D.K.*, 59 ECAB ____ (Docket No. 07-1441, issued October 22, 2007).

¹⁰ *K.H.*, 59 ECAB ____ (Docket No. 07-2265, issued April 28, 2008).

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration consists of an appeal request form with a checkmark next to "reconsideration." She does not explain any reasons why she thought the Office's decision was incorrect. Appellant does not advance a relevant legal argument not previously considered by the Office. She also does not demonstrate that the Office erroneously applied or interpreted a specific point of law.

The occupational therapy notes dated between July 2, 2004 to November 5, 2008 do not constitute relevant and pertinent new evidence not previously considered by the Office. These progress notes are already of record as appellant provided them prior to the Office's February 5, 2009 decision. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹¹

Because appellant's request for reconsideration does not meet at least one of the criteria required to reopen a case, the Board finds that the Office properly denied her request for reconsideration without a merit review.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an occupational disease in the performance of duty. The Board also finds that the Office properly denied her request for reconsideration without further merit review under § 8128(a).¹²

¹¹ *D.K.*, *supra* note 9; *D.I.*, *supra* note 3.

¹² Appellant submitted new evidence on appeal. However, the Board may only review evidence that was in the record at the time the Office issued its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated February 26 and 5, 2009 are affirmed.

Issued: December 16, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board